

~~CONFIDENTIAL~~

*Agree  
X-Contract.*

*DD/S*

15

11-30-71

0

25

MAY 21 1955

The Honorable Joseph Campbell  
Comptroller General of the United States  
Washington 25, D. C.

Dear Mr. Campbell:

This Agency has determined after some years of experience that certain types of services required in the fulfillment of its unique functions cannot be economically and satisfactorily performed by employees and are better obtained through contractual arrangements. We have, therefore, entered into contracts with individuals requiring that they supply confidential information and services in return for which they are to receive only such benefits as may be specified in the individual contracts. Normally, but not necessarily, a fee figured on so much per year of service is specified, and reimbursement for certain expenses, particularly in the case of foreign travel and operational costs, is allowed.

Each agreement specifically states in regard to the status of the individual that "you are not an employee of the United States Government under this agreement and are not entitled to any benefits normally incident to an employee status except as specifically enumerated herein." It is the position of this Agency that individuals performing services under such contracts are not employees of the United States Government but hold the status of independent contractors. They do not have the normal indicia of employment. The Agency does not exercise direct control over the individual in the performance of his work. It does not provide office space, tools, or appliances. There are no set office hours, and the individual carries out the work at such times and under such circumstances as he may consider expedient. He is not supervised in his employment. In short, he is told what information and services the Agency desires and is left largely to his own devices to produce. He utilizes other persons as he sees fit, and these persons are not supervised by the Agency. The sole restriction exercised through the contract or briefing is guidance on the security aspects of his mission.

The Agency's requirements may be precise and for a single occasion or they may be broad, contemplating an extended period. There is normally no accurate manner of putting a dollar value on

~~CONFIDENTIAL~~

the information or services to be obtained, although in some cases a negotiated figure can be reached. In most cases, however, the fairest method of computing the fee involved is to put it on an annual basis. We believe that under the circumstances this is the equivalent of a retainer to an attorney in normal private practice, which is frequently paid on an annual basis. The method of figuring the retainer, however, does not create an employer-employee relationship.

From the foregoing we conclude that the person contracting with this Agency under these conditions fits one of the common definitions of an independent contractor, "one who contracts to do a specific piece of work furnishing his own assistants, and executing the work in accordance with his own ideas, or a plan previously given to him by the person for whom work is done, without being subject to the orders of the latter with respect to the details of the work." 27 Am. Jur. 482.

The question of the precise status of such individuals has come to issue in connection with the utilization in this manner of certain retired officers of the armed services, who are selected because of qualifications of special value to this Agency, such as long training in the intelligence functions of their military components or because of special area knowledge or contacts developed through periods of overseas service. These officers may be subject to the provisions of either or both sections 59a and 62 of Title 5 of the U. S. Code. If we are correct in our position that the status is one of an independent contractor, a retired officer retired for longevity and drawing retirement pay in excess of \$2,500 would not be prohibited from entering into such a contract under section 62 of Title 5 of the U. S. Code. Also, he would not be subject to the prohibition of section 59a, which places a limit of \$3,000 on combined retired pay and salary and forces an election between the retired pay and salary if the combination exceeds \$3,000. As an independent contractor, he would be entitled to receive his retired pay and the fee involved.

While not affecting the legal technicalities of the problem, we feel it appropriate to point out the practical aspects relating to security. The fact that this Agency is utilizing the individual is normally properly classified SECRET. It is now the practice of the armed services to send to retired officers periodic questionnaires which, among other items, require them to answer whether or not they occupy an office or position outside their retirement under sections 59a and 62 of Title 5 of the U. S. Code. If they are independent contractors they can answer this properly in the negative, thereby not revealing their connection with this Agency. If, however, they were to be considered as employees within the contemplation of the cited sections, they would be required to reveal their employment in an unclassified document, thereby creating a grave risk of compromise of highly classified information.

In view of the fact that this is a matter of continuing importance to this Agency, I would greatly appreciate your views as to whether our opinion is correct that persons utilized under the circumstances stated do not hold an office or position within the meaning of sections 59a and 62 of Title 5 of the U. S. Code.

Sincerely,

SIGNED

Allen W. Dulles  
Director

OGC:LRH:jeb

cc: DCI (2)

✓DD/S

Director of Security

Director of Personnel

SSA/DDS

General Counsel